

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NORMAN KENNEY)	
Claimant)	
VS.)	
)	
O'NEAL ENTERPRISES)	Docket No. 233,161
Respondent)	
AND)	
)	
STATE INSURANCE FUND OF OKLAHOMA)	
)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant appealed the June 25, 2003 Order on Motion to Dismiss the State of Oklahoma Insurance Fund (Order) entered by Administrative Law Judge Robert H. Foerschler. The Board placed this appeal on its summary docket for disposition without oral argument.

APPEARANCES

Allan H. Bell and Jeffrey S. Bell of North Kansas City, Missouri, appeared for claimant. Kip A. Kubin of Kansas City, Missouri, appeared for the State Insurance Fund of Oklahoma. Michael R. Wallace of Shawnee Mission, Kansas, appeared for the Kansas Workers Compensation Fund. The alleged employer, O'Neal Enterprises, did not appear.

RECORD AND STIPULATIONS

The Board considered the transcript from the April 16, 2003 motion hearing and the various documents submitted by the parties to Judge Foerschler in support of their arguments as contained in the administrative file.

ISSUES

This is a claim for an August 15, 1997 accident.

The issue presented to the Judge at the April 16, 2003 motion hearing was whether the State Insurance Fund of Oklahoma (Oklahoma Fund) should be dismissed from this claim. The Oklahoma Fund argued that the Kansas Division of Workers Compensation did not have personal jurisdiction over the Oklahoma Fund as (1) the Oklahoma Fund did not have the authority to do business in Kansas, did not do business in Kansas and did not have any contact with Kansas whatsoever, (2) the Oklahoma Fund was created to insure Oklahoma employers and employees for Oklahoma injuries, and (3) the alleged employer, O'Neal Enterprises, is an Oklahoma company but claimant was not an Oklahoma employee as he was hired in Kansas, worked in Kansas and injured in Kansas. In short, the Oklahoma Fund argues that it did not insure the employer against liability under the Kansas Workers Compensation Act and, therefore, did not consent to personal jurisdiction as provided by K.S.A. 44-559.

In the June 25, 2003 Order, Judge Foerschler seemingly ruled that the Kansas Division of Workers Compensation did not have personal jurisdiction over the State Insurance Fund of Oklahoma. The Judge did not enter a specific order dismissing the Oklahoma Fund but such dismissal is implied.

Claimant contends Judge Foerschler erred. Claimant first argues that the Judge should not have heard the motion to dismiss as the employer was not given notice of the hearing. Next, claimant argues that the Kansas Division of Workers Compensation has jurisdiction because the Oklahoma Fund allegedly provided a certificate of insurance to a contractor, which allowed the employer to obtain a contract to perform work in Kansas. Moreover, claimant argues that the Oklahoma Fund admitted it insured the employer for purposes of this accident and provided claimant benefits after the accident occurred, which claimant contends confers jurisdiction over the Oklahoma Fund to the Kansas Division of Workers Compensation.

The Kansas Workers Compensation Fund (Kansas Fund) also appeared at the April 16, 2003 motion hearing. At that time the Kansas Fund argued that the hearing should be continued as the employer, O'Neal Enterprises, had not been notified of the hearing. And in its April 22, 2003 letter to Judge Foerschler, the Kansas Workers Compensation Fund argued that the motion to dismiss was premature stating, in part:

We believe that before the Oklahoma Fund should be dismissed, O'Neal Enterprises should be brought in as a party individually and possibly even KCP&L, for whom the Certificate of Insurance was issued. In sum, it wold *[sic]* be our position that a Motion to Dismiss is premature until all of the evidence can be brought forth for the Court to be able to make a determination.

The only issues before the Board on this appeal are:

1. Do either the Kansas Fund or claimant have standing to object to the lack of notice to the employer of the April 16, 2003 hearing? If so, what is the remedy?
2. Did the State Insurance Fund of Oklahoma establish that the Kansas Division of Workers Compensation lacked personal jurisdiction over that Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the file compiled to date, the Board finds and concludes that the June 25, 2003 Order should be reversed.

The Kansas Workers Compensation Act provides that employers operating under the Act shall secure the payment of workers compensation benefits by purchasing insurance from an insurance carrier authorized to do business in Kansas, by qualifying as a self-insurer, or by maintaining membership in a qualified group-funded workers compensation pool.¹ But when an employer fails to obtain workers compensation insurance coverage for its employees either by means of an insurance policy or through an approved self-insurance plan, the employer is a non-qualified self-insurer and, consequently, the employer is required to pay workers compensation benefits directly to the injured employee.²

Nevertheless, the Kansas Workers Compensation Act has a safety net. If an employer has no workers compensation insurance and the employer is financially unable to pay compensation to an injured employee or the employer cannot be located, the injured employee may seek compensation from the Kansas Fund.³ And the Kansas Fund has a cause of action against the employer for any compensation that the Fund pays.⁴

Moreover, injured employees of subcontractors may pursue compensation from a principal or general contractor.⁵ In those situations, the Act grants the principal or general contractor rights of indemnity. Such is the general statutory scheme.

¹ K.S.A. 1997 Supp. 44-532(b).

² K.A.R. 51-13-1(a)(2).

³ K.S.A. 44-532a(a) (Furse 1993).

⁴ K.S.A. 44-532a(b) (Furse 1993).

⁵ K.S.A. 1997 Supp. 44-503.

The Act also provides that every policy of insurance regarding liability under the Act shall contain an agreement that the insurance carrier accepts all of the Act's provisions and consents to personal jurisdiction. K.S.A. 44-559 provides:

Every policy of insurance against liability under this act shall be in accordance with the provisions of this act and shall be in a form approved by the commissioner of insurance. Such policy shall contain an agreement that the insurer accepts all of the provisions of this act, that the same may be enforced by any person entitled to any rights under this act as well as by the employer, that the insurer shall be a party to all agreements or proceedings under this act, and his *[sic]* appearance may be entered therein and jurisdiction over his *[sic]* person may be obtained as in this act provided, and such covenants shall be enforceable notwithstanding any default of the employer.

The present evidentiary record includes two letters regarding the Oklahoma Fund's insurance coverage. In a June 5, 1998 letter from the State Insurance Fund of Oklahoma to claimant's attorney, the Oklahoma Fund states that it provided workers compensation insurance coverage to the alleged employer, O'Neal Enterprises, on the date of accident. Nevertheless, on January 29, 1999, the Oklahoma Fund's attorney wrote claimant's attorney and advised that the Oklahoma Fund was not providing coverage for claimant's accident as he was not hired in Oklahoma and he was not injured there. Further confusion is added as on October 28, 1996, the Oklahoma Fund provided Kansas City Power & Light Company with a certificate of insurance indicating that the Oklahoma Fund provided O'Neal Enterprises, Inc., with workers compensation insurance coverage in Oklahoma and "extra territorial jurisdiction."

At this juncture, the Board concludes that the Oklahoma Fund has failed to prove that it was not providing the alleged employer with workers compensation insurance coverage that pertained to claimant's August 1997 accident. The record does not contain the insurance policy in question. The Board concludes that the Oklahoma Fund's request to be dismissed from this claim should be denied based upon this incomplete record.

The Board notes that both claimant and the Kansas Fund objected to the April 16, 2003 hearing as the alleged employer was not notified. The Board concludes that neither claimant nor the Kansas Fund has standing to make that objection. Nonetheless, by failing to notify the employer of the motion to dismiss or other matters, the Oklahoma Fund faces all attendant risks.

AWARD

WHEREFORE, the Board reverses and sets aside the June 25, 2003 Order on Motion to Dismiss the State of Oklahoma Insurance Fund.

IT IS SO ORDERED.

Dated this ____ day of October 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Allan H. Bell and Jeffrey S. Bell, Attorneys for Claimant
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